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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

W. H. TOMPKINS COMPANY, Now TOMPKINS MOTOR LINE, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

No. 681...

PETITION FOR RECONSIDERATION OF YOUR DECISION OF DECEMBER 9, 1946.

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PETITION FOR RECONSIDERATION OF YOUR DECISION OF DECEMBER 9, 1946.

To the Chief Justice and Members of the Supreme Court of the United States:

Your petitioner, being deeply aggrieved in the decision of this court, dated the 9th day of December, 1946, wherein you sustained the motion of appellee to dismiss our appeal for lack of the presentation of a substantial federal question, respectfully seeks your further consideration of this

matter to the end that this plaintiff be permitted to present its case upon its merits, and upon such further consideration you note probable jurisdiction, and in support of such plea, your petitioner shows to the court as follows:

PRESENT STATUS OF CASE.

On the 9th day of December, 1946, you entered your order reading as follows:

> **"Per Curiam: The motion to affirm is granted and the judgment is affirmed. United States v. Carolina Freight Carriers Corporation, 315 U. S. 475. Mr. Justice Black, Mr. Justice Reed, and Mr. Justice Douglas are of opinion that probable jurisdiction should be noted."**

PRIOR PROCEEDINGS.

This case involves a direct appeal from a final decree entered on July 8, 1946, of a specially constituted District Court of Three Judges, established pursuant to the Urgent Deficiency Act of October 2, 1913, which decree dismissed Appellant's complaint to set aside an order of the Interstate Commerce Commission. An appeal from this decree was allowed on August 2, 1946, and the motion to affirm was filed in the office of the Clerk of the United States District Court for the Middle District of Tennessee (Nashville Division), at Nashville, Tennessee, on August 19, 1946. Thereafter, a reply to this motion was made on September 20, 1946. In that reply, at pages 2 to 16, inclusive, we have given you a detailed account of prior proceedings before the Interstate Commerce Commission (in Docket MC-20783) as well as an account of a prior proceeding in the United States District Court at Nashville (Civil Action No. 258), wherein on July 7, 1942 this same application was remanded to the Interstate Commerce Commission and that Commission's order was set aside.

The appellant maintains that it is entitled to file this petition pursuant to the provisions of Rule No. 33, which reads as follows:

Rule 33. Rehearing.

> "A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session, and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."

BASIS FOR RELIEF.

The appellant only asks that it be afforded an opportunity to present its case for a determination on its merits. The motion for affirmance, while adroitly presented, was based upon generalizations, which denied to appellant an opportunity to squarely meet the issue which would be raised upon a presentation upon the merits of the case.

Upon reconsideration of this matter, it seems to us that the following factors should induce the court to give this case the kind of a review which only a presentation on its merits can assure.

In this case Mr. Tompkins, who still owns and controls appellant, like the Carolina Freight Carriers, Inc.,[1] and the Barrett Line,[2] seeks to continue a pioneer operation under the grandfather clause claims provision of the Interstate

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1 Carolina Freight Carriers v. U. S., 315 U. S. 475.

2 Barrett Lines v. U. S., 326 U. S. 179.

Commerce Act,[3] which you once described as a "grant of rights"[4] made by Congress to those of a class like this appellant.

The fact that the Interstate Commerce Commission found it necessary to issue three separate reports and orders,[5] all on a single record, in its effort to finally dispose of appellant's "grandfather clause" application would seem to indicate either a difficulty in the application of the proper standards, or a determined intent to support a predetermined conclusion by requisite findings.

The fact that the same United States District Court[6] decided appellant's two identical cases,[7] based upon a similar Interstate Commerce Commission record,[8] in directly opposite ways, would seem to indicate the difficulty involved in a proper disposition of this case, and would indicate the necessity for a disposition of the matter upon a presentation on the merits.

The fact that the District Court in Civil Action 258 set aside the Commission's order of May 29, 1941 based upon your opinions in the Hall and Carolina Carriers Cases, supra,[9] and the further fact that Judge Davies, in Civil Action 603, bases his dissent from the majority opinion upon your decision in those same two cases,[10] and the fur-

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3 Title 49 USCA 306 (a).

4 Carolina Freight Carriers v. U. S., supra.

5 See the Commission's decisions of May 29, 1941, July 1, 1943, and January 6, 1945.

6 In each instance the Court consisted of Circuit Judge Hicks and District Judges Taylor and Davies.

7 Civil Action 258 and Civil Action 603.

8 The only difference in the two records presented was that the latter case included the Commission's reports dated July 1, 1943, and January 6, 1945, which were served subsequent to the time the application was remanded in the first case.

9 See page 66 of our reply.

10 See page 72 of our reply.

ther fact that the Commission, in both its July 1, 1943, and January 6, 1945, orders base their action upon your decisions in the Carolina and Hall cases, and the further fact that both appellant[11] and appellees[12] have relied upon the dicta contained in those same two decisions to support their respective positions in this case, and the further fact that you, in support of your affirmance of appellees' motion, cite those same cases as authority, all should clearly indicate the need for clarification as to the manner in which the principles which you have promulgated in those cases should be applied to "grandfather clause" cases like the instant one.

The fact that the facts in the instant case are very similar to those reported in the Hall and Carolina Carriers cases, and the further fact that the validity of the commodity restrictions present the only issue, and the still further fact that after your decisions in those two cases, the Commission afforded those carriers the relief here sought, should be persuasive that at least an investigation of the record on the merits might avoid what is, to this appellant, disaster.

CONCLUSION.

We accept the fact that your decision was based upon the record as presented at the time of your decision, which was of necessity without the full record, and only with one argument of the parties restricted to the narrow scope of the motion.

We further accept the fact that the court is burdened by any number of frivolous appeals and that if the court is to efficiently perform its assigned functions, all cases

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11 See page 35 of our reply.

12 See pages 5, 6, 9 of Appellee's Motion.

which do not seem to involve substantial questions must be repelled at the threshhold.

Only because the effect of your decision in the Hall and Carolina cases are so important to the entire trucking industry and only because your affirmance of the appellees' motion in this case, without considering it on its merits, deprives owner of the appellant of the fruits of his life's industry and sets aside from him what you have heretofore described as Congress' "Grant of Rights" to him, do we ask you to review your prior action in the case.

As we realize that we, in our reply to appellees' motion, had little opportunity but to indulge in generalities, we sincerely believe that appellant is entitled to the relief which it seeks and we further believe that in an examination of this case on its merits such relief will be granted, we therefore ask that you reconsider your action on appellee's motion, and upon such reconsideration that you overrule such motion.

Respectfully submitted,

JAMES W. WRAPE,
Sterick Bldg.,
Memphis, Tenn.,
Attorney for Appellant.

Certificate of Counsel.

I, James W. Wrape, attorney for appellant, hereby certify that the foregoing petition is not presented for delay, but in good faith for the reasons stated in the said petition.

....., James W. Wrape.

Certificate of Service.

I, James W. Wrape, hereby certify that a copy of the foregoing petition was served upon W. P. Bartel, Secretary, Interstate Commerce Commission, Mr. Allan Crenshaw, attorney for said Commission, the Attorney General of the United States, and Mr. Horace Frierson, United States Attorney, and Mr. Wendell Berg, Ass't Attorney General.

....,

James W. Wrape.

No. 681. W. H. TOMPKINS CO., NOW TOMPKINS MOTOR LINES, INC., *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Middle District

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